WP(C) 458/2002
BEFORE
HON'BLE JUSTICE RANJAN GOGOI
.
J U D G M E N T

1. This writ petition has been filed assailing an order dated 29th of November 2001 passed by the Commissioner of Central Excise, Shillong confirming the demand of Rs.17,74,186.00s (Rupees Seventeen Lakhs Seventy-four Thousand One Hundred and Eighty-six) on the petitioner firm and further imposing a penalty of the same amount. The petitioner firm has also been made liable to pay interest at the rate of 24% per annum on the aforesaid two amounts. Besides penalty of Rs.5,00,000/- (Rupees Five Lakhs) only has been imposed on the managing partner and the Chartered Engineer of the petitioner firm. The aforesaid order dated 29th of November 2001 followed an adjudication of a show cause notice dated 18.1.2001 issued under the proviso to Section 11A(1) of the Central Excise Act seeking to recover Central excise duty erroneously refunded to the petitioner firm.

2. The facts, in brief, may be noticed at the outset.

The first petitioner, M/s. Upper Assam Tea Industries, is a registered partnership firm having its registered office at Lahoal in the Dibrugarh district of the State of Assam. It is engaged in the business of manufacture and sale of black tea. For such manufacture the petitioner had set up a factory unit which has been registered as a small scale industrial unit under the District Industries Center, Dibrugarh. The petitioner firm availed of the benefits under the Central Excise Notification No.33/99-C.E. dated 8.7.1999. The aforesaid notification No.33/99 contemplated exemption from payment of Central excise duty, for a period of 10 years, in respect of goods specified which were cleared from an eligible unit located in the State of Assam, Meghalaya, Tripura, Mizoram, Nagaland and Arunachal Pradesh. The exemption contemplated by the aforesaid notification was by way of refund of Central excise duty paid through the P. L. Account, after due verification of the entitlement of the concerned unit. Apart from the new industrial units which had commenced production on or after 24.12.97, existing industrial units which had undertaken substantial expansion by way of increase in installed capacity by not less than 25% on or after 24.12.97 were also made eligible to the benefits under the notification.

3. Claiming to be eligible to the benefits under the notification on account of expansion of its installed capacity to the extent of 44%, details of which will be noticed later, the petitioner firm filed an application dated 6.8.99 for refund of Excise duty paid during the period 8.7.99 to 31.7.99. Similar applications claiming refund of duty paid for each subsequent month upto 31.10.2000 were filed by the petitioner firm before the jurisdictional Central Excise authority as contemplated by the Notification Bearing No.33/99. The claim of refund made by the petitioner firm was verified by the competent authority and thereafter by separate orders passed on different dates commencing from 8.12.99, refund was granted for each of the months for which the claims in question were made. The petitioner availed of the refunds granted until the show cause notice dated 18th of January 2001 was issued seeking to recover the refunded amount on the ground that the amounts were erroneously refunded on account of willful suppression and misstatement of relevant facts.

4. The said show cause notice dated 18.1.2001 was earlier challenged before this Court in a proceeding registered and numbered as W.P.(C) No.2996 of 2001. By order dated 25.4.2001 this Court refused to entertain the writ petition and, instead, directed the petitioner firm to submit its reply to the said notice. Liberty, however, was granted to the authority to adjudicate the matter by taking up the issue of the maintainability of the show cause notice as a preliminary question. Following the aforesaid order of the Court the petitioner firm submitted

its reply and took part in the adjudication proceedings before the Collector whereafter the impugned order dated 29th of November 2001 has been passed confirming the demand raised and imposing penalty including personal penalty, as noticed above. Aggrieved, this writ petition has been filed.

5. I have heard Mrs. M. Hazarika, learned Senior Counsel appearing for the petitioners and Mr. D. Choudhury, learned Central Govt. Counsel appearing for the respondents.

6. The only issue that will be required to be decided in the present proceeding is the availability of the extended period of limitation under the proviso to Section 11A(1) of the Act to sustain the attempted recovery of duty allegedly erroneously refunded on account of alleged willful misstatement and suppression of the relevant facts by the petitioner assessee.

7. Section 11A(1) of the Act authorizes the competent authority to recovery duty short paid/not paid or erroneously refunded within one year from the relevant date by issuing a show cause notice and giving an opportunity to the assessee. The proviso to Section 11A(1) provides for an extended period of five years in place of one year within which the show cause notice could be issued, in the event the short or non-payment of duty or erroneous refund had occurred due to commission of fraud, collusion or willful misstatement or suppression of facts by the assessee.

8. Commission of fraud or existence of collusion, as the case may be, and suppression or misstatement of relevant facts by an assessee alone has clothed the authority with the jurisdiction to seek to recover short/not paid duty or erroneous refunds by invoking the extended period of limitation contemplated by the proviso of Section 11A(1) of the Act. The existence of the aforesaid facts has, therefore, to be understood as conditions precedent to the exercise of the power under the proviso. There can be no doubt that the expressions appearing in the proviso i.e. fraud, collusion, suppression or misstatement are strong expressions and therefore the same has to be construed by the Courts in a strict manner. The initial burden to prove the existence of any of the conditions precedent, therefore, will lie on the department and only after the said onus is satisfactorily discharged the burden may shift to the assessee. Suppression or concealment of facts and misstatement of relevant facts, which has been alleged against the petitioner firm in the present case, can be said to exist only if relevant facts within the knowledge of the petitioner firm were not placed before the Central Excise authority prior to the grant of the refund under the notification No.33/99. Such suppression or misstatement could also have occurred if documents relevant to decide on the eligibility of the petitioner firm to refund under the notification in question had been deliberately withheld by the petitioner. If, however, the department was in the full know of such facts and documents and on due consideration of the same the department had formed the opinion that the petitioner is entitled to refund, suppression or misstatement cannot be alleged merely because on reconsideration of the same facts the department is inclined to take a different view. The above, therefore, would be core areas for determination in the present case in the light of the materials placed on record by the contesting parties. However, before proceeding to embark upon the aforesaid exercise certain observations of the Apex Court in the case of Sarabhai M. Chemicals vs. Commissioner of Central Excise, Vadodara, [(2005)2 SCC 168] which would sustain the above formulation may usefully noticed :

23. Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/ assessments is different from raising of demand in relation to the extended period of limitation. Under Section 11-A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty

in relation to extended period is mentioned in the proviso to Section 11-A(1). U nder that proviso, in cases where excise duty has not been levied or has been sh ort-levied or short paid or erroneously refunded on account of fraud, collusion or willful misstatement or suppression of facts, or in contravention of any prov ision of the Act or Rules with the intent to evade payment of duty, demand can b e made within five years from the relevant date. In the present case, we are con cerned with the proviso to Section 11-A(1).

24. In the case of Cosmic Dye Chemical v. CCE this Court held that intention to evade duty must be proved for invoking the proviso to Section 11-A(1) for ex tended period of limitation. It has been further held that intent to evade duty is built into the expression fraud and collusion but misstatement and suppress ion is qualified by the preceding word willful . Therefore, it is not correct t o say that there can be suppression or misstatement of fact, which is not willfu l and yet constitutes a permissible ground for invoking the proviso to Section 1 1-A.

25. In case of Pushpam Pharmaceuticals Co. v. CCE this Court has held that t he extended period of five years under the proviso to Section 11-A(1) is not app licable just for any omission on the part of the assessee, unless it is a delibe rate attempt to escape from payment of duty. Where facts are known to both the p arties, the omission by one to do what he might have done and not that he must h ave done does not constitute suppression of fact.

27. The question is, whether in the present case, there was any willful supp ression of facts. On facts, as stated above, we find that the appellant had file d a classification list indicating Notification No.234/86 dated 3.4.1986as well as the chapter under which the goods fell. We have gone through the classificati on list. It indicates the claim for exemption. The classification list was duly approved by the department. So also monthly returns were filed by the appellant in the form of RT-12, in which there was a complete disclosure regarding the nat ure of the goods. These returns were regularly assessed by the department. The m aterial placed on record shows filing of gate passes, invoices and classificatio n list. They indicated the names of the consignees. A mere reading of these name s would indicate that sorbitol solution was sold to non-pharmaceutical companies like M/s Golden Tobaco Co. Ltd. Despite such disclosure, the department approv ed the classification list as well as RT-12 returns. There was no reopening of t he approvals and assessments within the stipulated period. In the circumstances, the Judicial Member of the Tribunal was right in holding that no case was made out for invoking the extended period of limitation. As stated above, the end use was built in the exemption notification. Therefore, the department could have d emanded duty within one year from the relevant date under Section 11-A(1). Howev er, this was not done. In the absence of evidence of suppression of facts, the J M was right in setting aside the show cause notices.

28. In the case of Jayant Vitamins Ltd. v. Union of India show cause cum dem and notice was issued by the department alleging non-user of bulk drugs for a sp ecified purpose. In that matter, goods were cleared without payment of duty, as in the present case, on the basis of certificate from the Drugs Controller. In t hat case, same Notification No.234/86 was relied upon by the assessee. However, on facts, the High Court found that the assessee had disclosed the relevant fats in the gate passes and, therefore, it was held that the department was not enti tled to invoke the proviso to Section 11-A(1). In our view, the judgment of the Madhya Pradesh High Court in Jayant Vitamins Ltd. is not on the applicability of Notificatioin No.234/86, as it is sought to be urged on behalf of the appellant . The said judgment is only on the point of limitation. It only states that the department was not entitled to invoke the proviso to Section 11-A(1) as the asse ssee had indicated in the gate passes the material facts. On this point, before concluding, we may mention that in the present case, we have come to the conclus ion that there was no willful suppression of facts on the part of the appellant as the appellant had filed the gate passes, invoices and monthly returns, which were all duly approved by the department from time to time. The invoices, gate p asses and the monthly returns indicated the names of the consignees from which i t was possible for the department to infer sale of sorbitol solution to non-phar

maceutical companies and yet no steps were taken by the department to raise the demand in time and, therefore, we hold that there was no willful suppression of materials facts for invoking the proviso to Section 11-A(1). The facts of the pr esent case are not confined only to gate pass clearances. In such cases it would not be proper for courts to rely on the evidence furnished only by gate passes.

9. The pleadings contained in the writ petition as well as the counter affi davit filed by the respondents and the detailed facts recited in the show cause notice dated 18.1.2001 as well s in the adjudication order dated 29.11.2001 woul d amply reveal that after the petitioner firm had lodged its first application f or refund of Central excise duty on 6.8.99 for the period 8.7.99 to 31.7.99 the officers of the department visited the factory premises of the petitioner firm a nd conducted a physical verification of the expansion work on the basis of which the claim for refund was made. The department had also issued a communication d ated 23.9.99 to the petitioner firm requiring it to submit the documents specifi ed in the said communication in order to enable the department to effectively sc rutinize the entitlement of the petitioner firm to refund. The documents require d to be submitted were duly submitted by the petitioner on 7.10.99 which, inter alia, were to the following effect.

1) Capacity assessment certificate by Chartered Engineer (showing installed capacity of the unit in pre-expansion period and post-expansion period).

2) Bill/invoice of the key machineries purchased for enhancement of install ed capacity.

3) Capital Investment Certificate from Chartered Accountant certifying the source of finance for expansion.

10. On 11.11.99 the Assistant Commissioner of Central Excise, Dibrugarh aga in visited the factory premises of the petitioner firm and sought further clarif ications which were offered by the petitioner by letter dated 12.11.99 and 22.11 .99. Specifically, in the letter dated 22.11.99 the petitioner firm had mentione d, by way of explanation, that during the financial year 1997-98 it had manufact ured 785772 kilograms of made tea by running the factory for 3551 hours in 226 w orking days. The petitioner firm also clarified that out of the 226 days of oper ation of the factory there was single shift operation in 22 days, double shift o peration on 101 days and triple shift operations on the remaining 103 days. It w as also clarified to the department that after enlargement of the installed capa city of the factory, during the financial year 1998-99, the petitioner firm manu factured 711817 kilograms of made tea by running the factory for 2016 hours in 2 23 days out of which the factory was run in single shift on 116 days, double shi ft on 89 days and triple shift on only 18 days. The materials on record also mak e it clear that on 6.12.99 the Chartered Engineer of the petitioner firm appeare d before the departmental authorities and submitted in writing the Section-wise installed capacity that was existing during the pre and post expansion period wh erein the details of the machinery as existing during the two periods in questio n were clearly indicated. The details of the aforesaid information made availabl e in writing by the Chartered Engineer, which have been extracted in the order d ated 29.11.2001, enables the Court to clearly identify the existing machinery pr ior to expansion and what was added thereafter to increase the installed capacit y of the factory as claimed. Such installation of the additional machineries at a cost of about 22 lakhs has been admitted by the respondents in the order dated 29.11.2001 itself. In fact, the respondents clearly admit that such additional machineries were procured and installed by the petitioner firm in its factory as evident from the sale invoices scrutinized by the department in the process of the verification undertaken.

11. In paragraph 8 of the counter affidavit the respondents have admitted th

at the department received explanations from the petitioner as to how during the pre-expansion period the petitioner firm could manufacture over seven lakh kilo grams of tea with the existing machinery while maintaining more or less the same level of production during the post expansion period. The respondents have also admitted that verification of the relevant documents had proved that the factor y was run for additional hours during the pre-expansion period as compared to th e post expansion period so as to make the extra production possible.

In paragraph 9 of the affidavit of the respondents it has been admitted that the eligibility of the petitioner to the benefit of exemption under Notific ation No.33/99 was determined by the Assistant Commissioner in the following man ner:

On examination of records and documents such as purchase of machineries and the ir installations, ground plans, sources of investment, evaluation report of Char tered Engineer etc. submitted by the assessee and thereafter by conducting physi cal verification on 11.11.99 and verifying the original documents accepted the r ecords filed by the assessee has undertaken substantial expansion by way of incr easing the installed capacity by not less than 25% on or after 24.12.97 and dete rmined their eligibility to get the benefit of exemption in terms of clause 3(b) of the notification No.33/99CE dated 8.7.99 and accordingly refund orders were issued vide order No.C.No.VI(18)20/REF/ ACD/99/2000/3362-64 dated 8.12.99 and su bsequently finalized under order No.C.No.V(18)20/REF/ACD/99-2000/1169-71 dated 2 4.4.2000.

12. A consideration of the above facts as revealed by the pleadings and othe r materials available on record makes it clear that the petitioner firm had clai med to have increased its installed capacity by installing certain additional it ems of machinery which installation is admitted by the respondents. The details of the manufacturing process; the constraints in increasing the volume of manufa cture on account of the limited capacity of one or two items of machineries; th e manufacture of over 7 lakh kilograms of tea with the available machinery by wo rking overtime and maintaining the same volume of manufacture by working lesser hours after installation of the new items of machinery were all known to the dep artment. The said facts were placed by the petitioner before the department eith er on its own or in response to queries made. All such facts were considered by the department. The documents adduced were examined. Only thereafter refund was granted. As evident from the order dated 29.11.2001 the department has subsequen tly taken the stand that the expansion of the factory unit of the petitioner fir m was in a limited manner and achieved by bringing in one or two additional item s of machinery. Coupled with the aforesaid facts the department has taken the v iew that even without the addition of the aforesaid new items of machinery the p etitioner had produced over 7 lakh kilograms of manufactured tea during the pre-expansion period. As the volume of manufacture during the post expansion period was also over 7 lakh kilograms of tea, the expansion projected by the petitioner firm for the purpose of refund has been understood to be a sham or pretence. On the said premises it has been concluded that there was a misstatement or a conc ealment of the installed capacity prior to expansion leading to erroneous grant of the refunds in question.

13. The two items of additional machinery introduced by the petitioner firm which introduction, according to it, enhanced its manufacturing capacity by 44% consisted of a withering through and a tempest drier. Before any refund was gran ted in support of its claim and in response to the verifications undertaken by t he departments, the petitioner firm had clearly stated the relevant and essentia l facts as to how the existing withering through and driers were acting as an in hibiting factor in production of more tea. The petitioner firm had placed before the department that notwithstanding such inhibitions, by running the factory ov ertime it had managed to achieve a high production i.e. over seven lakh kilogram s and further than the same level of production was reached during the post expa nsion period by working the factory for lesser number of hours. All the aforesai d facts were in the knowledge of the department. There was no suppression of the

manufacture of over 7 lakh kilograms of tea by the petitioner prior to expansion of the installed capacity of its factory unit. It is on due consideration of all the aforesaid facts that the department accepted the position and had decided on the entitlement of the petitioner firm to refund under the notification in question in its favour. The facts relevant being known to the department, by no stretch of reasoning, it can be said that there was any suppression or misstatement by the petitioner firm. The expressions appearing in the proviso to Section 11A(1) i.e. fraud, collusion, suppression and misstatement are not expressions of convenience to be used to camouflage a change of opinion already formed on consideration of all relevant facts. The said expressions convey a particular state of facts which have to be proved and established like any other question of fact on the basis of the materials on record. In the present case all relevant and required facts being placed and made known to the Department by the assessee, the plea of misstatement or suppression, as alleged, cannot be sustained. On the contrary, the Court is left convinced that what has been attempted to be done by the respondents in the present case is to reopen the issue by invoking the extended period of limitation on a mere change of opinion. Such a course of action not being permissible the Court is of the view that the impugned order dated 29.11.2001 is not legally sustainable. The said order, therefore, is set aside and the writ petition is allowed.